80-658

Supreme Court, U. S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October term, 1980

DARRYL R. FREY, PETITIONER
VS.
CHARLES M. PANZA, JR., RESPONDENT

DARRYL R. FREY, and
DARRYL R. FREY, INC., PETITIONERS
VS.
HAMPTON TOWNSHIP, RESPONDENT

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Maurice A. Nernberg, Jr., Esq.
W. Thomas Laffey, Jr., Esq.
NERNBERG & LAFFEY
924 Frick Building
Pittsburgh, PA 15219
(412) 232-0334

Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

1. Whether a person has a reasonable expectation of privacy in homes under construction and in a personal residence such that the protection of the Fourth Amendment right to privacy may be invoked to prevent a municipal official from making warrantless inspections to assure compliance with a building code.

2. Whether the building industry has been historically and pervasively regulated such that a recently enacted building code can authorize inspections without warrants as an exception to the general rule.

TABLE OF CONTENTS

Questions Presented for Review	I
Table of Contents	ii
Table of Authorities	iii
Reference to Opinions Below	vi
Grounds on Which Jurisdiction is Invoked	vii
Constitutional Provisions and Statutes Involved	viii
Statement of the Case	1
Argument	10
Appendix	24

Appendix "A": Petition for Rehearing and Order

Appendix "B": Opinion of United States Court of Appeals for the Third Circuit, filed June 9, 1980

Appendix "C": Opinion and Order of United States District Court for the Western District of Pennsylvania August 30, 1979

Appendix "D": Opinion of United States Court of

Appeals for the Third Circuit, filed August 31, 1978

Appendix "E": Opinion and Order of United States District Court for the Western District of Pennsylvania November 2, 1977

TABLE OF AUTHORITIES

Cases

Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 2d 930 (1967) 10

Colonnade Catering Corp. v. United States, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed. 2d 60 (1970).....19

Frank v. Maryland, 359 U.S. 360, 79 S.Ct. 804, 3 L.Ed. 2d 877 (1959)....11

Frey v. Panza, 583 F.2d 113 (3d Cir. 1978).....9

Frey v. Panza, [2], 621 F.2d 596 (3d Cir. 1980).....vi,9

Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 19 L.Ed. 2d 576 (1967).....10

Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed. 2d 305 (1978).....8, 12, 22

Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed. 2d 486 (1978) 8, 14, 22

Monnel v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978).....8

See v. Seattle, 387 U.S. 541, 87 S.Ct. 1737 18 L.Ed. 2d 943 (1967).....10

United States v. Biswell, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed. 2d 87 (1972).....19

CONSTITUTION

Fourth Amendment viii

Fourteenth Amendment.....viii

RULES

Federal Rules of Civil Procedure, 12.....8

STATUTES and ORDINANCES

28 U.S.C. §1254 (1) vii

28 U.S.C. §1343 7

42 U.S.C. §1983 .....ix, 7, 9, 10

Ordinance No. 193 (1975 BOCA Code)..ix, 18

112.0 ix
122.3 ix

29 U.S.C. §§651, et seq. 12

MISCELLANEOUS

Sanderson, Codes and Code Administration,
published by the Building Officials
Conference of America (1969).....20

OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals is reported at 621 F. 2d 596 (3rd Cir. 1980). The opinion from the District Court of the United States for the Western District of Pennsylvania from which this appeal to the Third Circuit was taken, was from an order granting summary judgment which is not a reported opinion. The opinion of the Third Circuit Court of Appeals remanding the case to the District Court for reconsideration is reported at 583 F. 2d 113 (3rd Cir. 1978). The decision of the District Court of the United States for the Western District of Pennsylvania dismissing the plaintiff's case from which the first appeal was taken is also not reported.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit affirming the District Court's summary judgment order was entered on June 9, 1980. Timely motion for rehearing was filed, and was denied on July 8, 1980. This Court has jurisdiction pursuant to Title 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the thing to be searched and the persons or things to be searched.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> §1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction, equal protection of the laws.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured and action at law, suit in equity, or other proper proceeding for redress.

The Hampton Township Ordinance No. 193 (i.e. the building code) provides in pertinent part:

> Article One, Administration and Enforcement
>
> §112.0 Right of Entry
>
> 112.1 General: In the discharge of his duties, the building official or his authorized representative shall have the authority to enter at any reasonable hour any building, structure, or premises in the jurisdiction to enforce the provisions of this code.
>
> Section 122.3 Violation Penalties
>
> Any person who shall violate

a provision of this Code or shall fail to comply with any of the requirements thereof, or shall erect, construct, alter or repair a building or structure in violation of an improved plan or directive of the building official, or of a permit or certificate issued under the provisions of this code, shall be guilty of a summary offense, punishable by a fine of not more than $300., or by imprisonment not exceeding thirty days, or both such fine and imprisonment. Each day that a violation continues shall be deemed a separate offense.

STATEMENT OF THE CASE

The facts giving rise to these actions may be summarized briefly as follows:

The Plaintiff Darryl R. Frey is an individual and President of the corporate Plaintiff Darryl R. Frey, Inc., (Frey). Frey is engaged in new home building. On occasion, where circumstances and opportunity have presented themselves, he has been in possession and control of land pursuant to agreements of sale with homeowners to build single family dwellings in Hampton Township, Pennsylvania. He has also personally owned land and built a home for himself in the Township.

Prior to June of 1976, construction in the Township was regulated under the provisions of a building code which

had been in effect since 1952. However, on June 15, 1976, Hampton Township enacted Ordinance Number 193 which adopted the Building Official's and Code Administrator's Basic Building Code of 1975 (BOCA Code). Section 112.1 of that ordinance authorizes the building inspector to enter at any reasonable hour any building, structure or premises in the jurisdiction to enforce the provisions of the code. There is no limitation on the inspector's authority to enter such structure, even after occupancy.

The inspection provision of this code has been the subject of controversy since its enactment. The North Hills Builders Association of which Frey is a member, began communicating their reservations to the Township officials regarding the unrestricted grant of power given to the building inspector. Less than three months after the enactment of the

code, there was a meeting with the North Hills Builders Association and the Township officials in which certain minor concessions relative to the Associations's complaints were made; but the Township refused to modify the inspector's "stop-by" inspection power.

Frey, thereafter on numerous occasions, personally and through counsel, notified the Township officers and Mr. Panza that the building inspector was not authorized to enter onto any of his property or property within his possession and control, without first obtaining prior consent or a search warrant. The inspector and the Township were notified that Frey believed that the inspection provision was overbroad, and was violative of his right to privacy.

Notwithstanding such notice, Panza and the Township attempted to vitiate Frey's refusal by modifying the

applications for building permits in such fashion as to create a form of implied consent of all applicants. Panza repeatedly entered upon Frey's properties and on the premises of his personal residence to inspect pursuant to the authority of the building code. In the course of so doing, he engaged in unreasonable searches and seizures for the purpose of obtaining information to be used and which was used for criminal prosecution of Frey under the ordinance. On Panza's application numerous criminal citations were issued by the local magistrate against the Plaintiffs. Some were subsequently withdrawn, and others were defended and dismissed. Additionally, orders to stop work were issued as a result of such stop-by inspections which interrupted and caused delays to Frey in the course of construction.

The 1975 BOCA Code does not

designate any required inspections. Panza himself stated that there are only four (4) inspections he requires. These are footer, foundation, framing and final inspection.

The Plaintiff has not objected to these four inspections and further testified that he will gladly call the inspector to come out when the premises are ready to be inspected. He even agreed to more frequent inspections as long as they are reasonable. On the other hand, the objections voiced by Frey are only to the so-called stop-by inspections which disrupt his employees, cause work to be done out of sequence because of the inspector's orders when the same may not be scheduled until sometime later during construction. As stated by Mr. Frey:

> "... I have been issued Field Correction Notices and also I have been cited on things that the inspector was never called to inspect, things that possibly

> were never finished and ready for inspection, such as, there is no sense in making a framing inspection when all the framing isn't done. Maybe the man that's working there knows something is wrong, but he doesn't intend to fix it that day, he wants to fix it the next day when it is feasibly [sic] economical for him to do so or to use his labor force properly.
>
> This is my argument, When I'm done with the framing, fine, I would like to have the privilege to call the man, call him to inspect and everybody is happy." (1st Injunction Hearing)

In addition, there is no limitation on the building official's right to inspect. Not only has he inspected buildings and premises prior to occupancy, but he has inspected after occupancy. One of the Plaintiff's allegations which was admitted by Panza (1st Inj. Hearing) was that the building inspector had entered on Plaintiff's own property without permission and after occupancy for inspection. (¶4e, Petition for Temporary Restraining Order)

It was only after repeatedly requesting and being denied relief from the Township and after being criminally prosecuted by the Defendants on numerous occasions for alleged violations of the code, that Frey filed the within actions for deprivation of his rights secured by the Constitution and to enjoin the unlimited inspection procedure which authorized searches without warrant to obtain or seize information for criminal proceedings.

The initial action, Frey v. Panza, was instituted by a Complaint seeking relief under 42 U.S.C. §1983. Jurisdiction of the District Court was authorized under 28 U.S.C. §1343. This was followed shortly by a Petition for Temporary Restraining Order. The Defendant Panza moved for a Stay of Proceedings which was denied. After the hearing on Preliminary Injunction, Panza filed

motions pursuant to Federal Rule of Civil Procedure 12 for dismissal of the action, which the District Court granted by Memorandum and Order for failure to state a claim upon which relief could be granted. The Court held that Darryl Frey's alleged right to privacy was di minimus under the facts in question. An appeal was taken from this Order and the Court of Appeals vacated and remanded for reconsideration in light of Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) and Michigan v. Tyler, 436 U.S. 499 (1978). The Third Circuit Court's opinion is reported at 583 F. 2d 113 (1978).

In the interim, this Court decided the case of Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978) in which municipalities such as Hampton Township were thereafter subject to suits for violation of individual rights.

Upon remand of the original case, a Complaint was filed by Darryl R. Frey and Darryl R. Frey, Inc. against Hampton Township seeking similar relief under 42 U.S.C. §1983. The Complaint was Answered, discovery undertaken, and both Defendants filed Motions for Summary Judgment. Another Motion for Preliminary Injunction was filed by the Plaintiff and a hearing was held. Thereafter, the District Court consolidated both actions and entered an Order denying Plaintiff's Motion for Preliminary Injunction and granted Defendant's Motions for Summary Judgment. An appeal followed, and the Court of Appeals affirmed, after briefing and oral argument. 621 F. 2d 596 (3rd Cir. 1980). Timely Petition for Rehearing was filed and was denied by Order of July 8, 1980.

ARGUMENT

I

If Frey can show that he has sufficient interest in the property subject to inspection to invoke the protection of the Fourth Amendment, then he is entitled to bring an action under 42 U.S.C. §1983. Both the District Court and the Court of Appeals found that Frey's interest in his property was di minimus. This Court has decided a long line of cases respecting privacy and the protection afforded people and not places by the Fourth Amendment. What a person seeks to preserve as private may be constitutionally protected. Katz v. United States, 389 U.S. 347, 88 S.Ct 507, 19 L.Ed. 2d 576 (1967). This Court subsequently by its decisions in Camera v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 2d 930 (1967) and See v. Seattle, 387 U.S. 541, 87 S.Ct. 1737, 18

L.Ed. 2d 943 (1967), examined the espoused purposes of municipal building inspections and held that notwithstanding that they are administrative rather than criminal in nature, probable cause and a warrant were required prior to entry. This Court in overruling the decision of Frank v. Maryland, 359 U.S. 360, 367-372, 79 S.Ct. 804, 3 L.Ed. 2d 877 (1959), developed new parameters for an individual's expectation of privacy, and held that his privacy right extends to buildings and areas controlled by statute, governing municipal inspections.

With the onset of the national trend toward health and safety, the public sector has increasingly, through legislation, attempted to encroach upon private enterprise by statutes authorizing unsolicited and non-consensual inspection and enforcement procedures. In view of these competing interests, the

threshold inquiry now revolves around a balancing test between the individual's right to privacy versus the public interest sought to be protected thereby. The most marked example of public interest legislation affecting privacy rights has been the Occupational Safety & Health Act of 1970, 29 U.S.C. §§651, et seq. (OSHA). OSHA is a health and safety statute and its espoused purpose is to protect the general welfare of working men and women by providing safe and healthful working conditions. Nevertheless, in Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S.Court 1816, 56 Law Ed. 2d 305 (1978), this Court refused to permit administrative searches absent a search warrant unless the underlying acts sufficiently prescribed the basis for such inspections and procedures to safeguard the privacy rights of the employers. The Court noted: (At 436 U.S. PP. 320-321).

> ...For purposes of an administrative search...probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an investigation are satisfied...
>
> A warrant showing that a specific business has been chosen for an OSHA search on the basis of an administrative plan for the enforcement of the Act derived from neutral sources...would protect an employer's Fourth Amendment rights.

In the Marshall decision, this Court specifically rejected the contention of the Secretary of Labor that the business had such a history of government regulation as to preclude the expectation of privacy.

The need for inspections under the OSHA Act is far more compelling than under the Building Code of Hampton Township. Each and every citation and stop--work order issued to Frey in the case at

bar, while allegedly for violation of the building code, did not involve a situation threatening the health and safety of the community. Unlike OSHA, the Hampton Township Building Code does not have any corollary administrative regulations defining or otherwise giving guidance to the builders and the inspector. For this reason, it follows that the Hampton Township ordinance cannot be afforded any better treatment than OSHA when no corollary public interest of health and safety is involved.

In Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed. 2d 486 (1978), this Court held that even commercial structures partially destroyed by fire retain the character of places subject to a reasonable expectation of privacy. The fact situation was similar to the instant case in which the Plaintiff Frey has made his expectation of

privacy during construction of single family dwellings evident to the appropriate authorities. This Court held in the Michigan v. Tyler's, factual situation which involved a warrantless search by police and fire officials after extinguishing a fire in a building, that the Fourth Amendment extended beyond systematic entry by law enforcement officials, whether they be health, fire, building inspectors or whether the purpose of the inspection was to locate or abate a suspected public nuisance, or simply to perform a routine periodic inspection.

Thus, to a builder such as Frey, the buildings under construction are his factory, and as long as walls and a roof are constructed and his employees are working, he has a reasonable expectation of privacy to be free from unreasonable inspection without notice or other basis of probable cause to believe that a

health and safety violation exists.

It is the Plaintiff's contention that there are ample alternate means by which the Township and its building inspector can determine whether a builder has complied with his building permit or with the BOCA Code short of unauthorized "stop-by" inspections. The Plaintiff and the other builders have suggested that there be a more detailed inspection schedule established by the Township, supplementing the four (4) standard inspections which the Township requires. (It should be emphasized that BOCA does not require any specific number of inspections). By this means the builders can call the building official to inspect when the work is in compliance with a particular stage of construction. The inspection is not to determine how that phase of the job is done or the means of construction, but is to determine that

at that particular point in time, the standards as set forth by the BOCA Code have been met.

Furthermore, it has been the Plaintiff's contention that a proper building inspection ordinance can and should include, similarly to OSHA, administrative guidelines sufficient to put builders on notice of what would be required at various stages of construction or what would be required for issuance of an administrative warrant. The fact that the Hampton Township Building Code wholly fails to set forth such standards is not the fault of Frey or the other builders, and cannot be utilized by the Defendants to justify their need for "stop-by" inspections.

The inspection provision of the ordinance in question authorizes inspection of not only uncompleted structures under construction, but also of finished

homes even after an occupancy permit has been issued. One of the particular complaints of Darryl Frey as set forth in the initial application for Temporary Restraining Order concerned inspection after occupancy of the Plaintiff's personal residence by the building official. It was a new home built on property of Darryl Frey and built by Darryl Frey and for which an occupancy permit had already been issued. It was built after enactment of Ordinance No. 193 and the inspection was performed pursuant to the stop--by inspection procedure. Clearly, Frey has a reasonable expectation of privacy under such circumstances, and the opinions of both the District Court and the Court of Appeals to the contrary are in conflict with the holdings of this Court.

II

The historical development of building codes and code administration is of relatively recent origin in comparison to the historically and pervasively-regulated industries such as liquor licensing and gun control which this Court has in the past found are subject to searches without warrants as an exception to the ordinary rule that searches without warrants are unreasonable per se. United States v. Biswell, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed. 2d 87 (1972), and Colonnade Catering Corp. v. United States, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed. 2d 60 (1970).

The Building Officials Conference of America did not first publish its basic building code until 1950. While it contains many members throughout the nation, there are only a very few larger

cities which have adopted the model code. For whatever reasons, the major cities have gone their own way and fashioned their own building codes. See, Sanderson, "Codes and Code Administration", published by the Building Officials Conference of America, Inc. (1969). It is only of a rather recent nature within the last four or five years that building codes have attempted to insert extremely broad inspection procedures such as that adopted by Hampton Township. The purposes of such building codes are to obtain a finished product in conformity with certain minimum basic construction standards.

A cursory review of the BOCA Code discloses that it makes no attempt to regulate the means of construction or health and safety during the building phase. For example, BOCA may require various distances between wood used

during framing depending upon the type of wood or the purpose it is used for. If in the course of framing the house, there exists larger or smaller distances between wood joists, neither harm nor reason for citation exists, because it is not until the framing is complete that compliance is required. Early inspection when not called for may allow for observation of non-conforming items of construction, but they may be only temporary and dependent upon the builder's construction schedule, his supplier's schedule or other variables. None of these items concern health and safety of the community whatsoever; but they can and do form a basis for stop-work orders or issuance of a criminal citation if further work is done. The BOCA Code unlike OSHA, is not a health and safety statute. Its aim is to achieve a <u>finished</u> product and not to regulate the manner

of construction.

For all of these reasons, the stop-by inspection provisions of the Code in question are more onerous than the provisions under the OSHA Act, do not relate to health and safety, and as a result thereof, have served to deprive the Plaintiffs of their constitutional right to privacy and serve as a basis for this Court to exercise its discretion and grant Certiorari.

The determination by the lower Court in the first instance which was upheld on appeal by the Third Circuit Court of Appeals, involves an important question of federal constitutional law which is believed to have been settled by this Court's prior decisions and culminating in the Marshall v. Barlow's, Inc., supra, and Michigan v. Tyler, supra, holdings. It is believed that the decision of the lower Court and the Court of Appeals have

been decided in a way in conflict with these decisions.

NERNBERG & LAFFEY

By Maurice A. Nernberg, Jr.
W. Thomas Laffey, Jr.
924 Frick Building
Pittsburgh, PA 15219
(412) 232-0334

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2463

DARRYL R. FREY,
Appellant,

vs.

CHARLES M. PANZA, JR.,
Appellee.

DARRYL R. FREY and
DARRYL R. FREY, INC.,
Appellants,

vs.

HAMPTON TOWNSHIP,
Appellee.

APPEAL FROM THE ORDER OF AUGUST 30, 1978, OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, AT CIVIL ACTION NOS. 77-769 AND 77-1069

PETITION FOR RE-HEARING

W. Thomas Laffey, Jr.
Maurice A. Nernberg, Jr.
NERNBERG & LAFFEY
924 Frick Building
Pittsburgh, PA 15219

Attorneys for Appellants

APPENDIX "A"

PETITION FOR RE-HEARING

AND NOW COME the Appellants, DARRYL R. FREY and DARRYL R. FREY, INC., and file the within Petition for Rehearing and aver in support thereof the following points of law and fact:

1. The appeal filed in this matter questioned not only the right of a municipal official to make warrantless inspection of houses under construction, but also the right under the Municipal Building Code to inspect houses after construction and occupancy. One of the averments was that the Building Inspector entered upon the personal residence of individual Plaintiff Darryl R. Frey for purposes of inspection after occupancy. See Reply Brief, p.2; Petition for Temporary Restraining Order, 14a.

2. No mention was made in the Opinion filed in this matter as to how or in what manner this can be considered a de minimis intrusion.

3. The 1975 Building Officials & Code Administrators International, Inc. Basic Building Code does not, anywhere in its 497 pages, set forth a schedule of inspection for construction in progress; the only inspection provision within the Code is that set forth in Section 112.2, which is the one subject to challenge by this appeal.

4. The BOCA Code is not a safety statute. Its aim is to establish uniform minimum standards by which the finished product can be judged. As indicated in the Preface to the Code at page iii:

> "...[It] states regulations in terms of measured performance rather than in rigid specifica-

> tion of materials and methods of construction...
>
> By presenting the purposes to be accomplished rather than the method to be followed, the Basic Building Code allows the designer the widest possible freedom and does not hamper development."

5. There is only one small section of the Code directly relating to unsafe structures, which is not challenged by this appeal. Therefore, the Court's Opinion that the municipality had a significant governmental interest in safe construction is inappropriate. See discussion in Reply Brief filed in this matter, pp. 3-5. Attached hereto and incorporated herein by reference as if set forth in their entirety are the only references to safety and the measures authorized by the Code for the municipality to correct any unsafe conditions. (§§124-125 - copies attached)

Therefore, since the municipal

official has intruded not only into buildings under construction, but also into residential areas of the Plaintiff, this case is completely on point with Camera v. Municipal Court, 387 U.S. 523 (1967). The breadth of the statute and the inspection provision thereof permits inspection not only of houses in the construction industry but any structures in the Township, be they residential or commercial; and, if commercial, be they buildings in the construction industry or any other trade. The case is therefore identical to Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). For all of these reasons, and these facts which were overlooked in the Court's Opinion, it is believed that the Appellants are entitled to a rehearing in this matter, so that the issue can be squarely decided for the benefit of the parties and further review

APPENDIX "A"

as may be requested in a Petition for a Writ of Certiorari with the United States Supreme Court.

Respectfully submitted,

NERNBERG & LAFFEY

By: _____
W. Thomas Laffey, Jr.
Attorneys for Appellants

APPENDIX "A"

CERTIFICATION OF COUNSEL PURSUANT TO RULE 22 OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AND NOW COMES counsel for DARRYL R. FREY and DARRYL R. FREY, INC. and files the following statement:

We express a belief, based upon a reasoned and studied professional judgment, that the Panel's decision is contrary to the decision of the Supreme Court of the United States in Marshall v. Barlow's Inc., 436 U.S. 499 (1978) and Michigan v. Tyler, 436 U.S. 499 (1978), and that this appeal involves a question of exceptional importance, to-wit, whether a municipality, by ordinance, can authorize its Building Inspector to enter at any reasonable hour any building, structure or premises in the jurisdiction

APPENDIX "A"

to enforce the provisions of this Code.

Respectfully Submitted,

NERNBERG & LAFFEY

By: _____
W. Thomas Laffey, Jr.

By: _____
Maurice A. Nernberg, Jr.

Attorneys for Appellants

APPENDIX "A"

THE BASIC BOCA BUILDING CODE/1975

SECTION 124.0 UNSAFE STRUCTURES

124.1 Right of condemnation: All buildings or structures that are or hereafter shall become unsafe, unsanitary, or deficient in adequate exitway facilities, or which constitute a fire hazard, or are otherwise dangerous to human life or the public welfare, or which by reason of illegal or improper use, occupancy or maintenance, shall be deemed unsafe buildings or structures. All unsafe structures shall be taken down and removed or made safe and secure, as the building official may deem necessary and as provided in this section. A vacant building, unguarded or open at door or window, shall be deemed a fire hazard and unsafe within the meaning of this code.

124.2 Examination and record of damaged structure: The building official shall examine every building or structure reported as dangerous, unsafe structurally or constituting a fire hazard; and he shall cause the report to be filed in a docket of unsafe structures and premises, stating the use of the structure, the nature and an estimated amount of damages, if any, caused by collapse or failure.

124.3 Notice of unsafe structure: If an unsafe condition is found in a building or structure, the building official shall serve on the owner, agent or person in control of the building or structure a written notice describing the building or structure deemed unsafe and specifying

the required repairs or improvements to be made to render the building or structure safe and secure, or requiring the unsafe building or structure or portion thereof to be demolished within a stipulated time. Such notice shall require the person thus notified to immediately declare to the building official his acceptance or rejection of the terms of the order.

124.4 Restoration of unsafe structure: A building or structure condemned by the building official may be restored to safe condition provided change of use or occupancy is not contemplated or compelled by reason of such reconstruction or restoration; is in excess of fifty (50) per cent of its replacement value, exclusive of foundations, such structure shall be made to comply in all respects with the requirements for materials and methods of construction of structures hereafter erected.

124.5 Posting unsafe notice: If the person addressed with an unsafe notice cannot be found within the city after diligent search, then such notice shall be sent by registered or certified mail to the last known address of such person; and a copy of the unsafe notice shall be posted in a conspicuous place on the premises; and such procedure shall be deemed the equivalent of personal notice.

124.6 Disregard of unsafe notice: Upon refusal or neglect of the person served with an unsafe notice to comply with the requirements of the order to abate the unsafe condition, the legal counsel of the jurisdiction shall be advised of all

the facts and he shall institute the appropriate action to compel compliance.

SECTION 125.0 EMERGENCY MEASURES

125.1 Vacating structures: When, in the opinion of the building official, there is actual and immediate danger of failure or collapse of a building or structure or any part thereof which would endanger life, or when any structure or part of a structure has fallen and life is endangered by the occupation of the building or structure, the building official is hereby authorized and empowered to order and require the inmates and occupants to vacate the same forthwith. He shall cause to be posted at each entrance to such building a notice reading as follows: "This structure is unsafe and its use or occupancy has been prohibited by the building official," and it shall be unlawful for any person to enter such building or structure except for the purpose of making the required repairs or of demolishing the same.

125.2 Temporary safeguards: When, in the opinion of the building official, there is actual and immediate danger of collapse or failure of a building or structure or any part thereof which would endanger life, he shall cause the necessary work to be done to render such building or structure or part thereof temporarily safe, whether or not the legal procedure herein described has been instituted.

125.3 Closing streets: When necessary for the public safety, the building of-

ficial may temporarily close sidewalks, streets, buildings and structures and places adjacent to such unsafe structure, and prohibit the same from being used.

125.4 Emergency repairs: For the purposes of this section, the building official shall employ the necessary labor and materials to perform the required work as expeditiously as possible.

125.5 Costs of emergency repairs: Costs incurred in the performance of emergency work shall be paid from the treasury of the jurisdiction on certificate of the building official; and the legal authority of the jurisdiction shall institute appropriate action against the owner of the premises where the unsafe building or structure was located for the recovery of such costs.

APPENDIX "A"

FOR THE THIRD CIRCUIT

No. 79-2463

DARRYL R. FREY,
Appellant

vs.

CHARLES M. PANZA, JR.,
Appellee

DARRYL R. FREY and
DARRYL R. FREY, INC.,
Appellants

vs.

HAMPTON TOWNSHIP,
Appellee

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, Circuit Judges.

The petition for rehearing filed by Appellants

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all

the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing denied.

By the Court:

Weis J.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 79-2463

DARRYL R. FREY
v.
CHARLES M. PANZA, JR.

DARRYL R. FREY and DARRYL R. FREY, INC.
v.
HAMPTON TOWNSHIP

DARRYL R. FREY and DARRYL R. FREY, INC.,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil Nos. 77-0769 and 78-1069)

Argued March 19, 1980

Before SEITZ, Chief Judge and WEIS and HIGGINBOTHAM, Circuit Judges

(Opinion Filed June 9, 1980)

W. Thomas Laffey, Jr., Esq. (Argued)
Maurice A. Nernberg, Jr., Esq.
NERNBERG & LAFFEY
924 Frick Building
Pittsburgh, PA 15219
Attorneys for Appellants

APPENDIX "B"

John Wesley Jordan, IV, Esq. (Argued)
THOMAS, RHODES & GRIGSBY
1724 Frick Building
Pittsburgh, PA 15219

Robert R. Graff, Esq.
MOHAN & GRAFF
2106 Law & Finance Building
Pittsburgh, PA 15219
Attorneys for Appellees

OPINION OF THE COURT

PER CURIAM:

The issue in this appeal is whether a municipal official may make warrantless inspections of houses under construction to assure compliance with the building code. The district court, after balancing the minimal privacy expectations of the builder and the significant governmental interest in safe construction, concluded that the inspections were permissible. We agree and affirm.

Plaintiff constructs residential houses in western Pennsylvania communities, including Hampton Township, Allegheny County. In the last several years he has had difficulties with defendant Charles Panza, the building inspector for the Township, who has issued citations alleging various infractions of the building code, and on occasion has shut down jobs.

In a suit filed in the district court, plaintiff asserted violations of his fourth and fourteenth amendment

rights and sought an injunction as well as damages. The district court dismissed the complaint, but on appeal we remanded for further development of the record in light of Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), and Michigan v. Tyler, 436 U.S. 499 (1978), Frey v. Panza, 583 F.2d 113 (3d Cir. 1978).

On remand, a companion action against the Township was consolidated with the first suit and the parties undertook additional discovery. After argument, the plaintiff's motion for a preliminary injunction was denied and the defendants motion for summary judgment was granted.

Beginning in 1952, Hampton Township adopted the building code compiled by the Building Officials & Code Administrators International, Inc. and its superseding versions as they were released. The 1975 code, which was introduced into the record, is a book of some 497 pages providing for the issuance of building permits, inspections of construction in progress, standards for building materials, design criteria for plumbing, electrical and structural members, and other detailed requirements for construction. Before building may begin, the contractor is required to obtain a permit conditioned upon agreement to comply with the Code §§113.1, 115.2. Four scheduled inspections are required during the construction and §112.1 gives the building inspector authority to enter the structure at any reasonable hour to enforce the provisions of the code.

APPENDIX "B"

The plaintiff stated that he had no objection to the regularly scheduled inspections but did not want the inspector on the premises without a warrant at any time that he chose. The district court concluded that evidence of the nature of the work, the condition of the premises, and the acquiescence in at least the scheduled inspections established at most only an insubstantial expectation of privacy. Against the de minimus intrusion caused by inspections, the court weighed the governmental interest in close supervision to insure safe construction, the inability to detect some violations of the code after construction had proceeded beyond certain stages and the infeasibility of having an inspector on the premises at all times. On balance, the court concluded that warrantless inspections were not unconstitutional.

In Marshall v. Barlow's, Inc., supra, the Supreme Court reiterated the applicability of the search warrant requirement of the fourth amendment to commercial structures with the exception of enterprises with "a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." Id. at 313. Those who voluntarily engage in such licensed and regulated businesses accept the burdens as well as the benefits of the trade. See G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977); Almeda-Sanchez v. United States, 413 U.S. 266 (1973), Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3d Cir. 1979), cert. denied, ____

APPENDIX "B"

U.S. _____, 48 U.S.L.W. 3435 (U.S. Jan. 8, 1980).

The record in this case shows that the construction industry in the Township in all its phases is subject to detailed and exacting regulation by the municipality. The contractor must file plans before he begins work and he is held to the requirements of the code as his project proceeds. He is aware in advance that the work is subject to inspection without notice. The construction industry has a long history of governmental supervision and oversight enforced by inspection. See United States v. Biswell, 406 U.S. 311 (1972) (firearms); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (liquor). And the statute challenged here is directed specifically and exclusively at that one industry. Cf. Marshall v. Barlow's, Inc., supra (statute authorized searches of all businesses within OSHA's jurisdiction).

We note also that the ordinance limits inspections to the construction site, at reasonable hours, and for the purposes of enforcing compliance with the building code. These restrictions point toward the reasonableness of the inspection and counsel against requiring an administrative warrant. See Marshall v. Stoudt's Ferry Preparation Co., supra.

The case at hand is distinguishable from Camara v. Municipal Court, 387 U.S. 523 (1967), where a city housing inspector sought to search a residential area. The Court found that without a

warrant, the occupant had no way of knowing whether an inspection was authorized or required or whether the search would be limited in scope. Id. at 532. Likewise in See v. City of Seattle, 387 U.S. 541 (1967), the fire department wished to inspect a locked, commercial warehouse as part of a citywide canvass to obtain compliance with the fire code. Since there was no showing that the owner lacked an expectation of privacy, even though the structure was commercial, the Court applied the general rule that a search is unreasonable if conducted without a warrant.

We conclude that the district court did not err in holding for the defendants and, accordingly, its judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals
for the Third Circuit

APPENDIX "C"

IN THE UNITED STATES DISTRICT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

DARRYL R. FREY, Plaintiff	)	
vs.	)	Civil Action 77-769 D
CHARLES M. PANZA, JR., Defendant	)	
DARRYL R. FREY and DARRYL R. FREY, INC., Plaintiffs	)	
vs.	)	Civil Action No. 78-1069 D
HAMPTON TOWNSHIP, Defendant.	)	

MEMORANDUM

BARRON P. McCUNE, District Judge
August 30, 1979

This action was instituted in 1977 pursuant to 42 U.S.C. §1983. Plaintiff, Darry Frey (Frey), sought an injunction prohibiting a continuing course of conduct by defendant, Charles M. Panza

(Panza), at the direction of defendant, Hampton Township (Hampton),[1] allegedly violative of his Fourth and Fourteenth Amendment rights. The conduct in question was the warrantless inspection by Panza, a building inspector for Hampton, of houses under construction, for building code violations. After hearings before the late United States District Judge John Miller, the complaint was dismissed. In an opinion filed November 2, 1977, Judge Miller found §1983 to be a proper vehicle for the assertion of plaintiff's alleged Fourth Amendment rights, but rejected plaintiff's contention that an expectation of privacy existed in and about houses under con-

---

[1] Hampton Township was sued in C.A. 78-1069 on the same theory, i.e., that the Ordinance in question violated Frey's rights. That action has been consolidated with the earlier action filed at C.A. 77-769.

struction. Plaintiff appealed Judge Miller's November 2, 1977 order. The Court of Appeals for the Third Circuit vacated the order and remanded the case for consideration of the subsequently decided cases of Marshall v. Barlow, Inc., 436 U.S. 307 (1978) and Michigan v. Tyler, 463 U.S. 499 (1978).

The case was reassigned after remand. Additional discovery was allowed. Defendants thereafter renewed their motions for summary judgment. Plaintiff also filed a "Motion for Preliminary Injunction."[2] A hearing on plaintiff's motion was held on July 31, 1979. Oral argument on defendants' motions for summary judgment were heard on that date as well. After considera-

---

[2]This was a new motion by Darryl R. Frey and Darryl R. Frey, Inc., asking an injunction against the Township.

tion of the evidence submitted and of the arguments and briefs submitted, we deny plaintiff's motion for preliminary injunction and grant defendants' motions for summary judgment.

In 1952, Hampton adopted the then current BOCA Basic Building Code (BOCA Code) as its building code. The BOCA Code is compiled by Building Officials and Code Administrators, Inc., and it has been adopted as a building code by numerous local governments. In the years since 1952, Hampton has adopted superceding versions of the BOCA Code as they were released.

The present BOCA Code provides for inspection of buildings for violations defined in the Code. Three sections of the BOCA Code are relevant to this action. These sections provide:

APPENDIX "C"

"111.1 Preliminary inspection: Before issuing a permit, the building official shall examine or cause to be examined all buildings, structures and sites for which an application has been filed for a permit to construct, enlarge, alter, repair, remove, demolish or change the use thereof; and he shall conduct such inspections from time to time during and upon completion of the work for which he has issued a permit; and he shall maintain a record of all such examinations and inspections and of all violations of this code."

"111.5 Final inspection: Upon completion of the building or structure, and before issuance of the certificate of use and occupancy required in Section 120.0, a final inspection shall be made and all violations of the approved plans and permit shall be noted and the holder of the permit shall be notified of the discrepancies."

112.1 General: In the discharge of his duties, the building official or his authorized representative shall have the authority to enter at any reasonable hour any building, structure or premises in the jurisdiction to enforce the provisions of this code."

APPENDIX "C"

All building in Hampton must be accompanied by the issuance of a building permit by Hampton. When a permit is issued, §115.2 of the BOCA Code provides that the permit is conditioned upon compliance with the BOCA Code. In effect, by seeking to commence construction, a builder consents to the applicability of the BOCA Code provisions to the building to be constructed, and the methods of construction stipulated in the BOCA Code must be followed. Sections 111 and 112 of the BOCA Code must be followed. Sections 111 and 112 of the BOCA Code are therefore a condition to permission to engage in construction work. The construction in question is of residential housing. Hampton is a growing residential community.

Defendant Panza is a building inspector for Hampton. On several occa-

sions Panza cited plaintiff for violation of the BOCA Code after a warrantless inspection. Plaintiff contested these citations. Plaintiff further considered Panza's inspections themselves burdensome. He brought this action to enjoin further inspections if made without a warrant, essentially arguing that a warrantless inspection was violative of the Fourth and Fourteenth Amendments.

Plaintiff maintains his expectation of privacy in and about residences under construction is substantial. Because of this asserted privacy interest, plaintiff considers a warrant to be necessary before any inspection can be made, unless consent to the inspection is previously obtained.

Plaintiff's contention must be judged in light of Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), Michigan v.

Tyler, 436 U.S. 499 (1978) and U.S. v. Biswell, 406 U.S. 311 (1972). These cases permit warrantless inspections when the requirement of a warrant would be burdensome to the governmental unit concerned and the privacy expectation of the individual is limited. For each statute allowing warrantless inspection, governmental interests must be balanced with individual expectations of privacy. Katz v. U.S., 389 U.S. 347 (1967). Privacy, however, is the focal interest.

Biswell, Barlow's, and Tyler approach the question of privacy expectations through consideration of the pervasiveness of regulation in the industry in question. If entrance into a market can be taken as an acceptance of regulation, an individual cannot be said to have a substantial reasonable expectation

of freedom from governmental intrustion. On the other hand, governmental intrusion into traditionally private concerns may well violate justified expectations of privacy. Barlow's, supra.

Review of the record in this case produces no real evidence of a substantial expectation of privacy on the part of a contractor in a residence under construction. A building under construction is neither the residence of the contractor nor is it his principal place of doing business. Records are rarely kept on the site. Indeed, the only items normally found at the site are tools, materials and the building in progress. Since the building is customarily inspected as required by the code on several occasions, a builder has no expectation that the building can remain private. Any expectation of privacy is de minimus,

APPENDIX "C"

as found by Judge Miller in his November 2, 1977 opinion.

There is governmental interest in close supervision of the job site. It is difficult and expensive to keep an inspector on the site at all times. Warrantless searches insure greater compliance with the building code, since the builder is aware of the possibility of an inspection at any time. Admittedly, although many of the violations which may exist cannot easily be concealed on short notice, some can be. The warrantless search does encourage greater compliance with the code than if a warrant were required. Since a contractor must expect regular inspections, the privacy expectation he has in the building site is nominal in comparison to the governmental interest in warrantless searches. Plaintiff's motion for preliminary injunction

is therefore denied. The defendant's motions for summary judgment will be granted.

An appropriate order follows.

BARRON P. McCUNE
UNITED STATES DISTRICT JUDGE

Dated: August 30, 1979.
cc: Counsel of record.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

DARRYL R. FREY, Plaintiff,	)	
	)	Civil Action No.
vs.	)	77-760 D
CHARLES M. PANZA, JR., Defendant.	)	
DARRYL R. FREY and DARRYL R. FREY, INC., Plaintiffs	)	
	)	Civil Action No.
vs.	)	78-1069 D
HAMPTON TOWNSHIP, Defendant.	)	

ORDER

AND NOW, August 30, 1979, plaintiff's Motion for Preliminary Injunction is denied. Defendant's Motions for Summary Judgment are granted.

BARRON R. McCUNE
UNITED STATES DISTRICT JUDGE

John M. Walsh, Esq.
W. Thomas Laffey, Jr., Esq.

APPENDIX "C"

Nernberg & Nernberg
924 Frick Building
Pittsburgh, Pa. 15219

Robert R. Graff, Esq.
Mohan & Graff
301 Law & Finance Building
Pittsburgh, Pa. 15219

James R. Hartline, Esq.
Thomson, Rhodes and Grigsby
1724 Frick Building
Pittsburgh, Pa. 15219

APPENDIX "D"

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 77-2586

DARRYL R. FREY,
Appellant
v.
CHARLES M. PANZA, JR.

Appeal From The United States District Court For The Western District Of Pennsylvania

(D.C. Civil No. 77-769)

Argued August 7, 1978
Before Aldisert, Van Dusen, and Hunter, Circuit Judges

(Opinion filed August 31, 1978)

Maurice A. Nernberg, Jr., Esq.,
W. Thomas Laffey, Jr., Esq.,
Nernberg & Nernberg,
Pittsburgh, Pa.,
Attorneys for Appellant

James R. Hartline, Esq.,
Thomson, Rhodes & Grigsby,
Pittsburgh, Pa.,
and
Robert R. Graff, Esq.,
Mohan & Graff
Pittsburgh, Pa.,
Attorneys for Appellee

APPENDIX "D"

OPINION OF THE COURT
VAN DUSEN, Circuit Judge

This case comes before the court on appeal from a district court order granting the defendant's motion to dismiss under F.R. Civ. P. 12(b)(6). The complaint alleged that the plaintiff, Darryl R. Frey, was a home builder who, on March 1, 1977, was in possession of a number of properties upon which he was constructing houses. These properties were located in Hampton Township, Pennsylvania, which had adopted the 1975 Basic Building Code of the Building Officials and Code Administrators International (BOCA Code). At all times pertinent to this case, defendant Charles M. Panza, Jr., was Hampton Township's duly appointed building official, as provided in the Code.

Section 113.1 of the BOCA Code states that any person seeking to initiate construction within the township must first obtain a building permit from the municipality's building official. The Code at §115.2 provides that, except where otherwise stipulated or legally granted, "[t]he permit shall be a license to proceed with the work and shall not be construed as authority to violate, cancel, or set aside any of the provisions of this code...." These Code provisions include §112.2, which authorizes the municipal building official "to enter at any reasonable hour any building, structure or premises in the jurisdiction to enforce the provisions of this code."

APPENDIX "D"

The complaint in this action further alleged that on March 1. 1977, Charles Panza entered certain dwellings being constructed by Darryl Frey and inspected them for building code violations. As a result of these inspections, the complaint asserted, the building official issued three citations charging violations of the BOCA Code. Plaintiff did not allege that he was ever convicted of these violations or that any criminal charges were pending against him.

Plaintiff instituted this action under 42 U.S.C. §1983, charging that the defendant's warrantless and uncontested inspections[1] of these uncompleted structures had violated plaintiff's Fourth Amendment rights. The district court entered an order on November 2, 1977, dismissing the complaint on the ground

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[1]To implement the Code, the Hampton Township Building Permit sets forth four required inspections: (1) footer inspection; (2) foundation inspection; (3) framing inspection; and (4) final inspection. Plaintiff's Exhibit 8, Hearing on Preliminary Injunction, August 19, 1977. In addition to these four announced inspections, the building inspector has the right under the Code to make unannounced, "stop-by" inspections without a warrant. It is the latter class of inspections to which plaintiff objects.

that no case had been called to its attention in which a court had extended the Fourth Amendment protection to uncompleted and unoccupied structures. The accompanying memorandum opinion stated:

> "[T]he Court seriously questions the propriety of extending Fourth Amendment protections to premises where the expectations of privacy can only be de minimis.
>
> "In the absence of persuasive authority, the Court concludes that uncompleted and unoccupied structures, such as those involved herein, are not within the ambit of the Fourth Amendment."

Frey v. Panza, Civil No. 77-769 (W.D. Pa., Nov. 2, 1977) (reproduced at 19a, 22a).

Subsequent to this district court decision, the Supreme Court of the United States has decided the cases of Marshall v. Barlow's Inc., 46 U.S.L.W. 4483 (U.S., May 23, 1978) and Michigan v. Tyler, 46 U.S.L.W. 4533 (U.S., May 30, 1978), which state its views concerning the Fourth Amendment's application in areas of the law similar to that involved in this case. In both these cases, the Court reaffirmed its earlier decisions in Camara v. Municipal Court, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967), emphasizing the following "governing principle":

> " '[E]xcept in certain carefully defined classes of cases, a

search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.'"

Barlow's, 46 U.S.L.W. at 4484; Tyler, 46 U.S.L.W. at 4535; both quoting Camara, 387 U.S. at 528-29. On the other hand, the Supreme Court in Barlow's and Tyler recognized that the class of exceptions from the general warrant requirement includes cases involving enterprises with "a long tradition of close government supervision of which any person who chooses to enter such a business must already be aware," Barlow's 46 U.S.L.W. at 4484, citing United States v. Biswell, 406 U.S. 311 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); and cases involving a "compelling need for official action," Tyler, 46 U.S.L.W. at 4536.

Under these circumstances, we will vacate the district court order and remand the case for further consideration in light of these two recent Supreme Court decisions. The district court will have the discretion to supplement the record with stipulations or factual findings which may aid it in applying these decisions to a record more fully developed than that now before us. Each party shall bear its own costs.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit

APPENDIX "E"

Memorandum
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

(Filed November 2, 1977.)

DARRYL R. FREY, Plaintiff	)	
vs.	)	
	)	Civil Action No.
77-769	)	77-769
CHARLES M. PANZA, JR.	)	
Defendant.	)	

MEMORANDUM

MILLER, J.

This action was instituted pursuant to 42 U.S.C. §1983. Essentially, plaintiff seeks to enjoin defendant from continuing a course of conduct which, allegedly, violates plaintiff's rights under the Fourth and Fourteenth Amendments.

At hearings conducted on August 19 and September 9, 1977, the Court heard testimony and argument on plaintiff's

APPENDIX "E"

Memorandum

Application for a Preliminary Injunction and defendant's Motion to Dismiss.[1] After due consideration of the evidence adduced at the hearing, the briefs of counsel and the applicable law, we shall grant the Motion to Dismiss.

DISCUSSION

The record reveals that plaintiff is Darryl R. Frey, a home builder and developer. Defendant is Charles M. Panza, Jr., a building inspector for Hampton Township. The crux of the

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[1] Defendant's motion was filed pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Defendant asserted that plaintiff failed to set forth facts which established a cause of action under §1983, and therefore that the Court lacked jurisdiction over the subject matter. Additionally, defendant asserts that plaintiff failed to state a claim upon which relief could be granted.

APPENDIX "E"

Memorandum

instant action, apparently, concerns defendant's "stop-by" inspections of certain structures (i.e., uncompleted and unoccupied houses) owned by or in the control of plaintiff. Frey asserts that said inspections, although purportedly within the enforcement provisions of Hampton Township Ordinance 193[2], were conducted without notice, consent, warrant or probable cause. Therefore, in the estimation of plaintiff, the inspections were violative of his rights under

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[2] Hampton Township Ordinance 193 (i.e., the building code) provides in relevant part:

ARTICLE 1 ADMINISTRATION AND ENFORCEMENT

SECTION 112.0 RIGHT OF ENTRY

112.1 General: In the discharge of his duties, the building official or his authorized representative shall have the authority to enter at any reasonable hour any building, structure or premises in the jurisdiction to enforce the provisions of this code.

the Fourth Amendment[3] and thereby deprived him of ". . . rights, privileges, or immunities secured by the Constitution . . . " within the meaning of 42 U.S.C. §1983.[4]

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[3] The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The guarantees of the Fourth Amendment are enforceable against the states via the Fourteenth Amendment. Ker v. California, 374 U.S. 23 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Wolf v. Colorado, 338 U.S. 25 (1949).

[4] 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

APPENDIX "E"

Memorandum

The Court notes that §1983 is an appropriate vehicle whenever there has been a deprivation of constitutionally protected rights under color of state law. Monroe v. Pape, 365 U.S. 167 (1961). A preliminary concern, therefore, is whether the instant action was properly brought under §1983. As stated in Adickes v. S.H. Kress & Co., 398 U.S. 144 at 150 (1970):

> "The terms of §1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must show that the

---

thereof to the deprivation of any rights, privileged, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

> defendant deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.' "

The issue, then, is whether defendant's inspections constitute illegal searches and thereby violate plaintiff's rights as secured by the Fourth Amendment. Implicitly, this involves a determination of whether Fourth Amendment proscriptions against nonconsensual warrantless searches extends to such premises as involved herein.

The Court has examined the case authority proffered by plaintiff.[5] Nonetheless, no case has been called to our attention in which a court has extended Fourth Amendment protections to uncom-

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[5] Plaintiff's argument is largely predicated on Camara v. Municipal Court of the City and County of San Francisco, 387

pleted and unoccupied structures.[6] While we realize the crucial importance of securing an individual's right of privacy against improper intrusion by government officials, the Court seriously questions the propriety of extending Fourth Amendment protections to premises where the expectations of privacy can only be de minimis.

U.S. 523 (1967) and See v. City of Seattle, 387 U.S. 541 (1967). Those cases, purportedly, hold that non-urgent administrative inspections of commercial and noncommercial premises are subject to the warrant requirements of the Fourth Amendment. Plaintiff urges that Camara and See should be controlling precedent here, as they have been held to be in searches conducted pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq. See, e.g. Barlow's, Inc. v. W.J. Usery, 424 F.Supp. 437 (D. Idaho 1977); W.J. Usery v. Centrif-Air Machine Co., Inc., 424 F.Supp. 959 (N.D. Ga. 1977); Brennan v. Gibson's Products, Inc. of Plano, 407 F.Supp. 154 (E.D. Tex. 1976).

[6] Admittedly, plaintiff cites United

APPENDIX "E"

Memorandum

In the absence of persuasive authority, the Court concludes that uncompleted and unoccupied structures, such

States v. Rubin, 343 F. Supp. 625 (E.D. Pa.), vacated, 474 F.2d 262 (3d Cir,). cert. denied, 414 U.S. 833 (1973), to support its contention that a house, albeit unoccupied, should be afforded the same Fourth Amendment protections as a fully occupied home.

The Court believes that there is significance in the fact that the Rubin house was unoccupied for the purpose of remodeling. Unlike the structure in the instant action, the Rubin house had, previously, attained a character which properly vested the owner or occupants with reasonable expectations of privacy.

The Court agrees with the reasoning expressed in United States v. Rubin, supra, at 628:

> "The test of any search, anywhere, any time, is the Fourth Amendment. This Constitutional mandate is premised, not upon the general character of the place searched, but whether or not the individuals had a reasonable expectation of privacy."

However, we cannot agree that reasonable expectations of privacy can attach to yet uncompleted and unoccupied houses.

as those involved herein, are not within the ambit of the Fourth Amendment. There being no deprivation of a constitutionally guaranteed right, then, the action was not properly brought under §1983 and must be dismissed. In so doing, however, we specifically limit our holding to the precise facts of this case and refrain from comment on the constitutionality of Article 1, Section 112.1 of Hampton Township Ordinance 193.

An appropriate order shall be entered.

Dated: November 2, 1977.

APPENDIX "E"

Memorandum

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

DARRYL R. FREY, Plaintiff	)	
vs.	)	Civil Action No. 77-769
CHARLES M. PANZA JR., Defendant.	)	

ORDER

AND NOW, to-wit, this 2nd day of November, 1977, for the reasons expressed in the foregoing Memorandum, defendant's Motion to Dismiss is hereby granted.

John L. Miller
United States District Judge

cc: John M. Walsh, Esq.
W. Thomas Laffey, Jr., Esq.
Nernberg & Nernberg
924 Frick Building
Pittsburgh, Pennsylvania
15219

Robert R. Graff, Esq.
Mohan & Graff

APPENDIX "E"

Memorandum

301 Law & Finance Building
Pittsburgh, Pennsylvania
15219

James R. Hartline, Esq.
Thomson, Rhodes & Grigsby
1724 Frick Building
Pittsburgh, Pennsylvania
15219

Supreme Court, U. S.
FILED
NOV 10 1980
MICHAEL RODAK, JR., CLERK

No. 80-658

In the Supreme Court of the United States

October term, 1980

DARRYL R. FREY, *Petitioner*

vs.

CHARLES M. PANZA, JR., *Respondent*

DARRYL R. FREY, and
DARRYL R. FREY, INC., *Petitioners*

vs.

HAMPTON TOWNSHIP, *Respondent*

Brief in Opposition to Petition for Writ of Certiorari

JOHN W. JORDAN IV, ESQUIRE
THOMSON, RHODES & GRIGSBY
1724 Frick Bldg.
Pgh, Pa. 15219
(412) 281-0737

JOHN R. ORIE, JR., ESQUIRE
ORIE & ZIVIC
25th Floor
Lawyers Bldg.
Pgh, Pa. 15219
(412) 281-3180
Attorneys for Respondents

Financial Press Corporation, Pittsburgh

QUESTION PRESENTED FOR REVIEW

Does the Fourth Amendment prevent a municipality from conducting an inspection of an uncompleted and unoccupied structure in order to ascertain whether it is being built in accordance with the building codes without first obtaining a search warrant?

TABLE OF CONTENTS

Question Presented for Review i
Table of Contents ii
Table of Authorities iii
Statement of the Case 1
Argument 1
Conclusion 5

TABLE OF AUTHORITIES

CASES

Page

Buffalo v. Chadeayne, 7 N.Y.S. 501 (1889) aff'd, 134 N.Y. 163, 31 N.E. 443 (1892) 3

Klingler v. Bickel, 117 Pa. 326, 11A. 555 (1887) 3

Marshall v. Barlow's Inc., 436, U.S. 307 (1978) 1, 2

Marshall v. Nolichuckey Sand Co., Inc., 606 F.2d 693 (6th Cir. 1979) cert. denied, ___ U.S. ___, 100 S. Ct. 1648 (1980) 3

Marshall v. Sink, 614 F.2d 37 (4th Cir. 1980) 3

Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3rd Cir. 1979), cert. denied, 444 U.S. 1015 (1980) 3

Marshall v. Texoline Co., 612 F.2d 935 (5th Cir. 1980) 3

Monell v. Department of Social Services, 436 U.S. 658 (1978) 1

United States v. Biswell, 406 U.S. 311 (1972) 1, 2

OTHER AUTHORITIES

Federal Coal Mine Health and Safety Act, as amended, 30 U.S.C. §§801 et seq. 2

BOCA Code, Section 100.4 ..... 3, 4

STATEMENT OF THE CASE

Petitioner is engaged in business as a builder in Western Pennsylvania. He commenced the original action against Charles M. Panza, Jr., the building inspector for Hampton Township, to enjoin the inspection of new houses being built by him in that municipality. All of the houses involved were uncompleted and had never been occupied.

A subsequently filed petition for a temporary restraining order added the assertion that Panza had "entered upon the premises of the personal residence of Darryl R. Frey" to ask questions. At the hearing it was explained that Panza had gone to Frey's home for that purpose but had not entered the house.

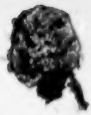
The district court denied plaintiff's request for a preliminary injunction and dismissed the action. Plaintiff then appealed to the United States Court of Appeals for the Third Circuit. Because of the intervening decision of *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), the court of appeals vacated the dismissal and remanded the matter to the district court for further consideration. 583 F.2d 113 (3d Cir. 1978).

After remand a second action was commenced against Hampton Township as then recently authorized in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). After further proceedings summary judgments were entered in favor of both defendants. The court of appeals subsequently affirmed in an opinion reported at 621 F.2d 596 (3d Cir. 1980). The petition which is presently before the Court seeks review of that decision.

ARGUMENT

The decision of the court below in the present case is in accord with the decisions of the other courts of appeals in similar cases and with the controlling decisions of this Court.

In *United States v. Biswell*, 406 U.S. 311 (1972), the Court



held that warrantless inspections of the premises of licensed firearms dealers did not offend the Fourth Amendment, explaining:

> "Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.
>
> It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." *Id.* at 316.

In *Marshall v. Barlow's Inc.* 436 U.S. 307 (1978), the Court held that warrantless searches of all businesses subject to OSHA were impermissible, but noted the continuing validity of cases like *Biswell,* stating:

> "Certain industries have such a history of government oversight that no reasonable expectation of privacy, see Katz v. United States, 389 US 347, 351-352, 19 L Ed 2d 576, 88 Ct 507 (1967), could exist for a proprietor over the stock of such an enterprise. Liquor (Colonnade [Catering Corp. v. United States, 397 U.S. 72 (1970)]) and firearms (Biswell) are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." *Id.* at 313.

Since the *Barlow's* decision a number of courts of appeals have been faced with the question of whether warrantless inspections of mines may be conducted under the Federal Coal Mine Health and Safety Act, *as amended,* 30 U.S.C. §§801 *et*

seq. These courts have uniformly held that such inspections are proper. *Marshall v. Sink,* 614 F.2d 37 (4th Cir. 1980); *Marshall v. Texoline Co.,* 612 F.2d 935 (5th Cir. 1980); *Marshall v. Nolichuckey Sand Co., Inc.,* 606 F.2d 693 (6th Cir. 1979), *cert. denied,* ___ U.S. ___ , 100 S.Ct. 1648 (1980); *Marshall v. Stoudt's Ferry Preparation Co.,* 602 F.2d 589 (3d Cir. 1979), *cert. denied,* 444 U.S. 1015 (1980). The Fifth Circuit's explanation in *Texoline* is representative of the rational of these decisions:

> "As exceptions to the warrant requirement, the Court [in Barlow's] cited enterprises where businessmen would have no reasonable expectation of privacy. These included certain pervasively regulated industries, typified by *United States v. Biswell,* 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (firearms), and those closely regulated businesses having a long history of governmental inspection and supervision, typified by *Colonnade Catering Corporation v. United States,* 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1972) (liquor). Proprietors in these types of businesses consent to these restrictions by choosing to accept the benefits of their trade. 436 U.S. at 313, 98 S.Ct. at 1820. Other than falling within these exceptions, the reasonableness of the warrantless search will depend on the specific enforcement needs and privacy guarantees of the particular statute under review. *Id.* at 321, 98 S.Ct. at 1825." 612 F.2d at 937.

The only question of even colorable substance in the present case was whether the rules stated in the above cases permit warrantless inspections under the BOCA Code of buildings under construction. The courts below were clearly correct in holding that such inspections were proper.

It cannot seriously be denied that there is a long history of governmental regulation of construction in built up areas in this country. *See e.g., Klingler v. Bickel,* 117 Pa. 326, 11 A. 555 (1887); *Buffalo v. Chadeayne,* 7 N.Y.S. 501 (1889), *aff'd,* 134 N.Y. 163, 31 N.E. 443 (1892).

It is also clear that the building industry is pervasively regulated. The BOCA Code and the similar uniform codes published by the International Conference of Building Officials and the Southern Building Code Congress International, Inc., have been adopted by at least 4,455 municipal corporations. This number is generally comprised of smaller municipalities like Hampton Township because most larger cities have developed their own codes.

The BOCA Code consists of 497 pages. Its purpose is indicated in Section 100.4, which states:

> "This code shall be construed to secure its expressed intent, which is to insure public safety, health and welfare insofar as they are affected by building construction, through structural strength, adequate egress facilities, sanitary equipment, light and ventilation and fire safety; and, in general, to secure safety to life and property from all hazards incident to the design, erection, repair, removal, demolition or use and occupancy of buildings, structures or premises."

The safety of the people who will later live in a building can only be insured if it is inspected on as close to a continuous basis as possible while it is under construction. Because of this, since it was first issued in 1950 the BOCA Code has contained inspection provisions like those now challenged by petitioners. If this right of inspection were limited it would not be possible to insure compliance with many requirements. For instance, it is not possible to tell whether concrete is being poured when the surrounding temperature is too low without being on the site at the time. Further, after concrete is poured it is not possible to tell whether it contains required reinforcing rods.

It should also be noted that the new buildings that are involved in this case have never been occupied and therefore cannot contain personal effects of occupants. All that is present is a partially completed product (the building) and the

materials and tools with which it is being finished. It is submitted that one who undertakes to make a complex and highly regulated product can not reasonably object to the inspection of all phases of its execution.

CONCLUSION

For the reasons set forth above, the petition for writ of certiori should be denied.

Respectfully submitted,

JOHN W. JORDAN, IV, ESQUIRE
THOMSON, RHODES & GRIGSBY

JOHN R. ORIE, JR., ESQUIRE
ORIE & ZIVIC
Attorneys for Respondents